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NO. 86-503 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

On September 26, 1986, petitioner Richmond, Fredericksburg & Potomac Railroad Company [hereinafter, "RF&P"] filed a petition with this Court for a writ of certiorari asking this Court to review the decision by the United States Court of Appeals for the Fourth Circuit in *RF&P v. BMWE,* 795 F.2d 1161 (4th Cir. 1986). Respondent Brotherhood of Maintenance of Way Employes

[hereinafter, "BMWE"] waived its right to respond to that petition on October 9, 1986, in view of this Court's decision in *Burlington Northern R.R. v. BMWE,* Sup. Ct. No. 86-39, on October 6, 1986, to review a comparable decision by the Seventh Circuit. However, on October 24, 1986, this Court requested that respondent file a response to the RF&P's petition. This response is respectfully submitted pursuant to that request.

COUNTERSTATEMENT OF THE CASE [1]

While respondent BMWE does not agree fully with petitioner RF&P's Statement Of The Case, including, in particular, petitioner's recitation of facts which are neither in the record of this case nor subject to judicial notice (*e.g.,* "Post-Decision Picketing," Pet. at 7-8), respondent submits that petitioner's statement at pages 3 through and including page 7 to "Post-Decision Picketing," and at pages 9 and 10 at part C, except as noted below, adequately sets forth the factual circumstances of this case. Respondent, therefore, has not submitted a separate Statement Of The Case, except as necessary to correct several inaccuracies on matters which respondent considers to be relevant.

Petitioner RF&P asserts that the district court in this case "explicitly found that RF&P was a 'neutral' in the primary labor dispute" and that the lower court "specifically found that the picketing of the RF&P by BMWE would have no effect on the parties engaged in the primary labor dispute . . . ." Pet. at 4-5 (footnote

[1] Petitioner RF&P states that Section 20 of the Clayton Anti-Trust Act is relevant to this petition, but then directs this Court's attention to Section 6 of that Act, 15 U.S.C. § 17, which it reproduced in Appendix D to its brief at p. 26a. Respondent BMWE agrees that Section 20 of the Clayton Act is relevant, but that section is included in the United States Code at 29 U.S.C. § 52. Petitioner BMWE has attached as Appendix A to this Response a copy of that statutory provision.

omitted). Respondent BMWE respectfully submits that those assertions misconstrue the record in this case.

In early April 1986, petitioner twice asked the district court to enjoin temporarily picketing which was occurring, first at one yard at the north end of its line (*i.e.*, the Potomac Yard) and then at a yard on the southern end of its line (*i.e.*, Acca Yard). On both occasions, the parties presented their cases to the court on affidavits and oral argument; no live testimony was taken, and the parties did not engage in any discovery. Indeed, respondent BMWE presented only one affidavit in this case, and that was on April 4, 1986. However, in its affidavit in opposition to petitioner RF&P's April 4, 1986 application for a Temporary Restraining Order and motion for a Preliminary Injunction, respondent BMWE explained why the Organization had decided to picket the RF&P's north end facility at Potomac Yard in Alexandria, Virginia. As respondent explained (Joint Appendix in 4th Cir. No. 86-3544 at 14):

> The D&H [Delaware & Hudson Railway, a railroad affiliated with the carriers against whom the BMWE was on strike] operates into plaintiff [RF&P's] . . . yard in Alexandria, Virginia (*i.e.*, the Potomac Yard), and obtains substantial traffic by interchange with other railroads in that yard. The BMWE has determined that it is important to the effectiveness of its strike against [the primary carriers] . . . to ask D&H employees and other rail employees in the RF&P's Potomac Yard to withdraw their services from their employers in order to prevent the movement of rail cars to or from the Guilford Rail System [the corporate rail system to which the D&H and the primary disputants belonged]. This action is necessary to place sufficient economic pressure upon the Guilford Rail System to

> convince them that it is in their economic interests to have the [primary carriers] . . . resume negotiations with the BMWE in order to resolve the disputes with this labor organization over rates of pay, rules and working conditions for employees which the BMWE represents on the [primary carriers] . . . .

Respondent BMWE did not, either at the first hearing on April 4, 1986, or at the hearing on the second request for a preliminary injunction on April 10, 1986, challenge petitioner's assertion that it was a neutral in the underlying dispute. Respondent, however, did maintain that petitioner's actions in interchanging cars with the D&H,[2] a corporation affiliated with the primary disputants, explained why the union was picketing first the Potomac Yard, and then Acca Yard in Richmond after the success of respondent BMWE's picketing was nullified by petitioner's use of supervisors to operate the Potomac Yard. *See,* Transcript of April 10, 1986 at 9-11. In denying petitioner RF&P's requests for injunctive relief, the district court assumed that the RF&P was a neutral in the underlying dispute; it did not, however make a finding of fact on that issue.

Petitioner's assertion that the district court found that the picketing would have no economic effect on the union is inaccurate. Here, the district court stated with respect to its denial on April 10, 1986, of a preliminary injunction to prohibit picketing of the Acca Yard in Richmond that "there is no showing that such picketing will result in any economic impact on" respondent BMWE. Pet. at 24a. Such a statement, however, does not equal a finding that picketing of both RF&P yards (*i.e.,* Potomac Yard and

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[2] The extent of the interchange was shown by petitioner's proffer on April 10, 1986, that between April 2 and April 10, approximately 450 cars accumulated in Potomac Yard for interchange with the D&H. Transcript of April 10, 1986 at 13.

Acca Yard) would have no effect on the parties engaged in the primary labor dispute. Rather, it simply reflects the fact that respondent BMWE did not seek to present any evidence to justify its reasons for picketing Acca Yard, because the wisdom or reasonableness of the union's actions was irrelevant to the jurisdictional issue raised by petitioner RF&P's request for injunctive relief. Respondent BMWE respectfully submits that it is inaccurate to change the court's negative statement into a positive finding of fact.[3]

RESPONSE TO REASONS FOR GRANTING THE WRIT

Respondent BMWE Respectfully Submits That This Court Should Defer Ruling On This Petition For A Writ Of Certiorari Until After It Decides No. 86-39, *Burlington Northern R.R. v. BMWE*

Respondent BMWE agrees with petitioner RF&P that the issues raised by this petition are important and should be decided by this Court. However, respondent respectfully submits that in view of the writ of certiorari which was issued on October 6, 1986 in No. 86-39,

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[3] Petitioner RF&P also states that the recommendations of Emergency Board No. 209 "have not been adopted by" the parties to the underlying labor dispute. Pet. at 8. That statement was literally correct on September 26, 1986, but misleading because respondent BMWE had accepted the Board's recommendations shortly after they were issued on June 20, 1986. *See,* Report of Congressional Advisory Board created by Pub. L. No. 99-385, at 7-8 (September 8, 1986). Moreover, that statement is no longer correct, for on September 30, 1986, Public Law No. 99-431 was signed into law requiring the parties to the underlying dispute to adopt the Emergency Board's recommendations, and on October 30, 1986, an arbitration panel established in accordance with that Act issued its award adopting those recommendations. It should be noted that the railroads involved in the underlying labor dispute are challenging the validity of both Public Law No. 99-431 (*i.e., Maine Central R.R. v. BMWE,* D.Me. Civil Action No. 86-0311-P) and the award (*i.e., Maine Central R.R. v. BMWE,* D.Me. Civil Action No. 86-0366-P).

Burlington Northern R.R. v. BMWE, there is no need, at this time, for this Court to grant the writ requested by petitioner RF&P. As petitioner noted in its Supplemental Brief to this Court, the issues raised by the petition in this case are currently before this Court in No. 86-39; those issues are being briefed on a schedule which will permit oral argument in February 1987.[4] To grant the writ in this case at this time will either cause an unnecessary delay in the resolution of No. 86-39 while the two cases are consolidated and the RF&P prepares its brief, or, if the cases are not consolidated, will entail needless duplicative efforts on the part of the parties and this Court while the same issues being raised in No. 86-39 are briefed and argued in the *RF&P* case.

Respondent BMWE respectfully submits that there is no need to go through such futile exercises, since the facts and the issues raised in the *RF&P* case are comparable to those presented by the *Burlington Northern* case. The *Burlington Northern* case involves threatened picketing of a road which, like the RF&P, connects with the D&H, but also involves threatened, and in one case, actual picketing of other roads which have no physical connection with the primary disputants or with any of their corporate affiliates. In view of the fact that the *Burlington Northern* case presents all of the issues raised by the *RF&P* case, but does so in a more complete factual setting, BMWE suggests that this Court defer ruling on the RF&P's petition for a writ of certiorari and hold that petition in abeyance until it decides No. 86-39, *Burlington Northern R.R. v. BMWE.*

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[4] Petitioners' brief on the merits in No. 86-39 was filed on November 20, 1986.

CONCLUSION

Respondent BMWE respectfully submits that this Court should defer ruling on the pending petition for a writ of certiorari in this case until after it issues its decision in No. 86-39, *Burlington Northern R.R. v. BMWE.*

Respectfully submitted,

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APPENDIX A

Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from pain or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value or from peaceably assembling in a lawful manner, or for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.